to be decided in the appeal, therefore, I think I ought to refrain myself at this stage from making any ruling which is bound to prejudice one of the parties to the appeal.

Now, on the merits, with respect, it is my view that I fail to see any merit at all in this application. The learned Magistrate might be wrong, or she might be right, in appointing a different date for the assessment of general damages. But even assuming for the moment that she was wrong in terms of procedure, nonetheless I do not think that she has done anything that was really extraordinary. The respondents/plaintiffs in this case, having succeeded in their action for defamation, like any other plaintiff in a similar action, are entitled to know how much damages, be it nominal or otherwise, they are going to get. All that the learned Magistrate wants to do is just to determine the general damages. And I am of the opinion that the fairest thing to do under the circumstances is not to interfere but to let the learned Magistrate finish her job (to dispose of this case).

I consider it speculative and farfetched for the applicant to argue that the hearing of the assessment of the damages may be used by the respondent to reopen the case. The hearing is only for the purpose of assessing general damages in terms of prayer 15(a) of the respondents'/plaintiffs' statement of claim. Therefore, needless to say, no party can make use of the hearing for any other purpose. Moreover, the applicant is given an opportunity to be present and to be heard at the hearing. He is entitled to object to anything done either by the Magistrate or the respondents/plaintiffs at the hearing which in his opinion is an abuse of the procedure. He is also entitled to appeal to this Court against any ruling which he feels is improper or wrong in law.

Finally, I must stress here that I fail to see any abuse of the process of Court by the learned Magistrate. I wish to remind that parties to a case should refrain from accusing any Judge or Magistrate of abusing the process of Court, unless such accusation could be justified by strong and clear evidence. Otherwise the party or Counsel concerned may be cited for contempt of Court.

Accordingly, this application is dismissed with costs.

Application dismissed.

CHERYL WENDY OMAR

v.

PUBLIC PROSECUTOR

HIGH COURT SABAH & SARAWAK, TAWAU
TUAN IAN H.C. CHIN J.
[CRIMINAL APPEAL NO. T(42)-13 OF 1993]
15 JULY 1994

CRIMINAL LAW: Charge of criminal breach of trust - Penal Code s. 409 - Ingredients - Entrustment - No evidence that cash money stated in the charge paid or entrusted to accused - Accused proved to have issued payment receipts - Prima facie case - Whether established.

CRIMINAL PROCEDURE: End of prosecution case - Accused called upon to rebut prosecution's case on the balance of probabilities - Whether a misdirection in law.

EVIDENCE: Burden of proof - Proof of guilt - Whether onus thereof could shift to the accused - Evidence Act s. 104 - Issuance of payment receipts per se - Whether sufficient proof that money was paid - Whether correctness of facts stated therein to be proved independently.

This was an appeal by the accused against the conviction and sentence passed against her by the Sessions Judge, Tawau, in respect of an offence of criminal breach of trust under s. 409 Penal Code. In essence the charge against the accused was that between the months of January to November 1990, at the Water Bill Collection Counter, Majlis Perbandaran Tawau, the accused, as a public servant and entrusted with cash of RM156,663.90, committed criminal breach of trust in respect of that property.

The facts showed that the accused, who was employed by the Water Department, was assigned the duty of collecting money due on bills at the said office from consumers of water. For that purpose she was given some books of receipts to be issued to the payers and also cash books in which to record the necessary entries respecting the money she received from those payers. It was also her duty to cause the money thus received to be credited to the bank for the credit of the Government.

Through an audit report of one Mr. Chong, evidence was adduced which showed that during the material period the accused had issued 1749 receipts in respect of payments by consumers amounting to RM156,663.90, which money,

according to the prosecution, the accused must have received by virtue of the issuance of those receipts but had failed to credit to the Government's account. However, no evidence had been led to show the actual payment of those moneys to the accused.

The Sessions Judge had called for the accused's defence because, according to her, the accused "has to rebut prosecution's case on a balance of probabilities by entering his defence". On appeal the main issues that arose were:

(1) Whether the Sessions Judge had misdirected herself by imputing to the appellant a duty to rebut the prosecution case.

(2) Whether the mere production of copies of payment receipts signed by the accused was sufficient proof that the accused had been paid the sums and paid by the persons named therein.

Held:

[1] The Sessions Judge, in requiring the accused to rebut the prosecution case had thereby shifted the onus of proof to the accused to establish her innocence which is against the time-honoured principle of criminal law. By so doing, the Sessions Judge had failed to consider whether the defence of the accused had, on the balance of probabilities, cast any doubt in the case of the prosecution. The course she adopted amounts to imposing on the accused a higher standard of proof than that of creating reasonable doubt because the burden of rebutting a presumption is heavier than that of only creating a reasonable doubt. This clearly is a serious misdirection on the part of the Sessions Judge.

[2] The mere production of copies of receipts signed by the accused is not proof that the accused had been paid the sums and by the persons named therein. The payers themselves or someone who had seen the payment must be called to give evidence. This the prosecution failed to do.The requisite ingredient of entrustment implicit in the charge, hence, has not been proved.

[3] The audit report should not have been admitted as evidence in place of the oral testimony of the maker thereof because in a criminal case, except where statutes allow, it is wrong for a witness to produce a report as a substitute for oral evidence. In any event, the report, which was relied on very heavily by the Sessions Judge in coming to her conclusion that there was a *prima facie* case, does not establish the fact of any payment of money by anyone to the accused. It was prepared on the assumption that money was paid to the accused by virtue of the receipts being issued by the accused. Hence, even assuming it to be admissible, it does not become proof of any payment of money to the accused.

[4] The only clear evidence that money had been paid to the accused and which was not disputed, was in respect of RM4512.10 which the said Salmiah Talib received from the payers and which she thereafter gave to the accused but was not credited to the Government by the accused. This piece of evidence did establish a *prima facie* case of criminal breach of trust though only in respect of that amount. The charge, at the very least, should have been amended accordingly at the close of the case for the prosecution and the accused called to enter her defence thereto.

[Conviction and sentence set aside. Case reverted to Sessions Court for retrial before another Sessions Judge].

Cases referred to:

Mohd Radhi bin Yaakob v. Public Prosecutor [1991] 3 MLJ 169 ***(refd)***

Pang Chee Meng v. Public Prosecutor [1992] 1 MLJ 137 ***(foll)***

Woolmington v. DPP [1935] AC 462 ***(foll)***

Wong Sieng Ping v. Public Prosecutor [1967] 56 ***(refd)***

KPM Khidmat Sdn. Bhd. v. Tey Kim Suie [1994] 2 AMR 27: 1417 ***(foll)***

Chong Khee Sang v. Pang Ah Chee [1984] 1 MLJ 377 ***(refd)***

Saw Thean Teik v. R [1953] MLJ 124 ***(refd)***

Legislation referred to:

Criminal Procedure Code, s. 171A
Evidence Ordinance, s. 104
Penal Code, s. 409

For the appellant - Sugumar Balakrishnan; M/s. Sugumar & Co.
For the Public Prosecutor - Mohd Yazid bin Mustafa, Senior Federal Counsel

JUDGMENT

Ian H.C. Chin J:

Cheryl Wendy Omar ("the accused") was on 20 December 1993 convicted of the offence of criminal breach of trust under s. 409 of the Penal Code and was sentenced to three years imprisonment. The charge against her was that:

> ... in between 2 January 1990 and 24 November 1990, at the Water Bill Collection Counter in

the building of Majlis Perbandaran Tawau (MPT), in the District of Tawau, in the State of Sabah, being in a manner entrusted with property and in your capacity as a public servant, to wit, a total sum of cash amounted RM156,663.90, committed criminal breach of trust in respect of that property, and that you have thereby committed an offence punishable under s. 409 of the Penal Code.

She appeals against the conviction and sentence. The evidence adduced at the trial are as follows. The accused was at the relevant time employed by the Water Department. It is not in dispute that she was at all relevant time a public servant within the meaning of s. 409 of the Penal Code. She was assigned the duty of collecting money due on bills at the office in the Tawau Municipal Council from consumers of water and for that purpose she was on the following dates given the following books of receipts, *viz*:

No.	Date	Receipt Book
(1)	8 October 1990	Receipts No. 134751 to 135000 ("Book (1)");
(2)	12 October 1990	Receipts No. 135001 to 135250 ("Book (2)");
(3)	18 October 1990	Receipts No. 135251 to 135500 ("Book (3)");
(4)	24 October 1990	Receipts No. 135751 to 136000 ("Book (4)");
(5)	1 September 1990	Receipts No. 183251 to 183500 ("Book (5)");
(6)	1 September 1990	Receipts No. 183501 to 183750 ("Book (6)");
(7)	3 November 1990	Receipts No. 136001 to 136250 ("Book (7)");
(8)	8 November 1990	Receipts No. 184001 to 184250 ("Book (8)");
(9)	14 November 1990	Receipts No. 184251 to 184500 ("Book (9)").

Each book had 250 receipts and each receipt was made up of an original, a duplicate, a triplicate and a quadruplicate. Apart from the receipt books, the accused was also given cash books to record the moneys she received. She also maintained a register where a cashier called Aminar bte Abdullah ("Aminar") acknowledged receipt of money from her for the purposes of Aminar depositing the same into a bank to the credit of the Government. The accused was supposed to issue the original receipt to the payer, while the duplicate was to be given to the Water Department and the triplicate to the State Treasury in Tawau. The quadruplicate was to be kept in the office of the Tawau Municipal Council. Aminar, after she received the money from the accused, would deposit the money into a bank for the credit of the Government and the bank-in slips, prepared by the accused, would then be given back to the accused who should in turn forward them, together with the triplicate receipts, to the Treasury Officer in Tawau who would enter the detail of the deposits in a book called "Komputer Buku Terima-Terimaan". All payments received must be entered by the accused into the said cash book. All books of receipts where the receipts had been completely used up must be returned by the accused to the officer who issued the receipt books. Those were the procedures involving the collection and the depositing into a bank of moneys collected by the accused which the evidence established.

Goh Phin Yin ("Goh") was the Treasury Officer of Tawau for the period from 5 November 1990 to 2 December 1990. On 12 November 1990 he asked the accused for the cash book but she replied that the cash book was in the house and that she had not made any entry. On 21 November 1990, he was in the office of the Tawau Municipal Council when he observed that the accused had two receipt books when she was supposed to have only one and he seized one, Book (9), from the accused. All, except the receipts no. 184469 and 184470, of the originals of Book (9) were no longer present but the other three copies of each of the receipts remained in Book (9) and they bore no dates. The said two originals, no. 184469 and 184470, were dated 22 November 1990 though it was then only 21 November 1990. Goh was then of the view that there existed the possibility that the accused had not deposited the moneys she had received into the bank for the credit of the Government. Goh then gave instruction to prevent the accused from further collecting moneys. Goh on further investigation found out that all the amounts shown in all the receipts no. 184251 to 184468 of Book (9), totalling RM23,913.10, were not credited to the account of the Government in the said Komputer Buku Terima-Terimaan. Goh then contacted a Charles Chong ("Chong") of the Treasury headquarter in Kota Kinabalu. Chong came to Tawau on 22 November 1990 to conduct an internal audit and was given Book (9).

Chong, after satisfying himself that the said sum of RM23,913.10 was not accounted for, asked the accused to produce the eight other receipt books that were issued to the accused. The accused explained that she had taken them home to do postings in the cash book and she said she will try her best to produce them to Chong. The relevant cash book also reveal that the sum of RM23,913.10 was not posted. On 23 November 1990, the accused produced only five used receipt books (Book (2), (4), (5), (6) and (8)) with all the duplicates and triplicates (and quadruplicates as well) intact instead of being forwarded respectively to the Water Department and the Tawau Treasury Officer. The

accused later produced the remaining three used receipt books (Book (1), (3) and (7)). On 6 December 1990, the accused produced 114 cheques she had received but did not deposit into the bank. Chong then prepared his report and came to the conclusion that, apart from cheques, a cash sum of RM156,663.90 was unaccounted for and this is the sum the accused was charged to have committed criminal breach of trust. Chong talked to three payers who confirmed paying respectively RM72, RM24 and RM468.90 and who were issued the respective receipts 184398 (Book (9)), 136014 (Book (7)) and 135246 (Book (2)) and these moneys were not accounted for. Of these three persons, one was Chung Chook Lim, the officer who issued the said receipt books to the accused but he, in his testimony, never say that he had paid the accused any sum of money for which he was issued the receipt 184398. The other two persons were not called as witnesses. On 7 December 1990 the accused telephoned Chong to say she wanted to settle the problem and asked Chong to help her to which Chong told her to "settle all the money used up by her". Not a single person was called to testify to the payment to the accused of any of the sum of RM156,663.90. Instead, two persons who made payment by cheques were called to testify. Their evidence were obviously of no relevance since the charge concerns cash payment which the accused was alleged to have been entrusted. Chong's internal audit report (exhibit P15) which is dated 11 December 1990 reads:

Presiden,
Majlis Perbandaran Tawau,
Tawau.

Datuk

Kehilangan Wang Kerajaan Negeri Sabah Hasil Air - Majlis Perbandaran Tawau.

Adalah saya diarah melapurkan satu permeriksaan Audit Dalam saya ke Pejabat Majlis Perbandaran Tawau Datuk. Adalah didapati sembilan (9) buah buku resit untuk air telah diambil dan disimpan oleh Puan Cheryl Wendy Omar yang diberi kuasa untuk menandatangani Resit Air di Bahagian Pungutan Hasil Air Tawau.

Mengikut surat Datuk MPT/AC/15/114(A) bertarikh 7 April 1989, Puan Cheryl Wendy Omar Pembantu Tukan Skel D45 telah diberi kuasa oleh Datuk untuk menandatangani resit air bagi pungutan Hasil Air di Majlis Perbandaran Tawau mulai tarikh surat itu.

2. Kehilangan sembilan (9) buah buku resit air itu, enam (6) telah dikembalikan oleh Puan Cheryl Wendy Omar pada 23 November 1990 ke Pejabat Datuk dan tiga (3) buah buku resit air lagi dikembalikan pada 5 Disember 1990 Kesemua sembilan (9) buah buku resit air itu telah dikembalikan kepada Akauntan di Majlis Perbandaran Tawau, Encik Ismail Myakob pada 5 Disember 1990.

3. Lanjutan kepada pameriksaan Audit Dalam saya didapati sebanyak RM237,212.10 Hasil Air telah diterima oleh Puan Cheryl Wendy Omar tetapi belum dimasukkan ke dalam Bank untuk dikreditkan kepada Hasil Air Kerajaan Negeri Sabah walaupun resit-resit telah dibarikan kepada orang-orang awam di Tawau.

Buku Resit Ait	**Resit No.**
...	...

Resit Hasil Air yang dikeluarkan tetapi belum dibayar kepada Bank untuk **dikredit kepada Hasil Air.**

... RM213,334.40

Cek yang telah diterima tetapi resit masih belum dikeluarkan bagi

...
Jumlah besar RM237,212.10

4. Dalam 1922 resit Hasil Air yang diterima bernilai RM213,334.40 sebanyak 173 resit yang dikeluarkan adalah yang diterima cek dari awam bernilai RM56,670.50 (seperti Lampiran B) disertakan.

... RM 56,670.50

Cek-ek yang menerima Hasil Air yang tersebut di atas seperti Lampiran A disertakan itu telah diterima dari Puan Cheryl Wendy Omar pada 5 Disember 1990 dari rumahnya.

Bagaimana buku resit Kerajaan Negeri boleh dibawa pulang rumah sendiri termasuk cek-cek yang diterima untuk Hasil Air dari orang awam atau Syarikat.

5. Dalam kiraan saya didapati sebanyak 1749 resit yang dikeluarkan untuk menerima wang tunai bernilai sebanyak RM156,663.90 belum saya perolehi lagi. (Mengikut jawapan lisan dan Puan Cheryl Wendy Omar dia akan membayar wang yang kurang itu dengan ansuran bulanan). Ini adalah alasan untuk mempercayai bahawa sesuatu kesalahan jeneyah telah dilakukan berhubung dengan kehilangan wang Hasil Air sebanyak RM156,663.90. Saya barsukacita jika Datuk dapat memberi arahan yang berkenaan supaya wang itu dibayar balik kepada Kerajaan dengan seberapa segera.

6. Penyiasatan sepatutnya perlu mengenai resit yang dikeluarkan oleh Pejabat Datuk. Nampaknya tarikh yang ada di dalam resit asal adalah lain dan tarikh resit salinan kedua, ketiga dan keempat, seperti resit JA No. 184398 yang diterima dari Chung Chuak Lim berjumlah RM72 tarikhnya di dalam resit asal ialah 19 November 1990 tetapi dalam salinan kadua, ketiga dan keempat nampaknya tiada tankh.

7. Cadangan

(a) Pejabat ini mencadangkan bahawa Buku Kaunterfoil patut dikawal selamat. Buku resit sepatutnya dikeluarkan selapas buku resit yang lama dikembalikan.

(b) Kuasa untuk menandatangani Hasil Air bagi pungutan Hasil Air kepada Puan Cheryl Wendy Omar ditarikh balik dengan segera.

(c) Semua Hasil Air sebanyak RM237,212.10 dijelaskan dan dibayar masuk ke Bank untuk kredit Akaun Bendahari Daerah Tawau.

(i)	Cek Sabah Bank 941015	RM23,599.80
(ii)	MBB 006104	RM 16.00
(iii)	PHBM 190942	RM 261.90
(iv)	111 cek dalam Lampiran A	RM56,670.50
(v)	173 resit dalam Para 3 - 4 RM213,334.40 - 56,670.50	RM156,663.90
	Jumlah	RM237,212.10

(d) Semua resit dan buku tunai (terima) dimajukan ke pejabat Bendahari Daerah Tawau untuk dimasukkan ke akaun bulan Disember 1990.

(e) Seorang Kerani kanan atau Kerani diberi kuasa untuk menandatangani resit dan menerima wang untuk Hasil Air bagi pihak MPT atau Bahagian Pungutan.

Sekian, terima kesih.

...[Signed Charles Chong]...

In brief, the report says that the accused did not deposit in the bank for the credit of the Government a sum of RM156,663.90 being the proceeds of 1749 receipts which the accused had issued and which 1749 receipts came from the books of receipts which the accused was issued with. For the purpose of the report, Chong conducted tests and this is how he described what he had done in his testimony:

> Until today there is a short of RM156,670.90 unaccounted for.
>
> I made a test by asking PW1 to produce his own original receipt for paying his own water bill with the number of JA No. 1834398 for the payment of RM72. It turned out that the payment of RM72 was not accounted for.
>
> I made another test by asking Mr. Thomas Voo to produce an original receipt paying RM24 for Malaysian Redlines Building with JA136014. It turned out that RM24 was not accounted for.
>
> I went to one shop Goh Kong Teng who produced an original receipt of RM468.90 with the receipt number of JA135246. It turned out that RM468.90 was not accounted for.

Salmiah Talib, who worked as an Assistant Administrative Officer of the Tawau Municipal Council, testified that she helped the accused to receive payments and had issued the receipts no. 135329 (Book (3)); 135911, 135817 and 135816 (Book (4)); 135046 to 135051, 135063 to 135102, 135166 to 135173, 135178 to 135180 (Book (2)) and all the money, according to Salmiah Talib, were handed to the accused. Her evidence was not challenged at all by the erstwhile Counsel for the accused. According to Chong, out of those receipts, six were in respect of payment by cheques and these were:

Receipt No.	Bank & Cheque No.	Amount RM
135067	UMBC 000620	112.00
135071	HSBC 201316	104.00
135081	HSBC 239812	96.00
135084	MBB 014590	164.70
135090	HHB 378381	76.50
135101	SBB 969083	193.50

while the rest involved cash amounting to (which I added up) RM4,512.10.

Aminar in her testimony did not say how much money was given by the accused to her for the purpose of depositing the money into the bank. She, however, testified, after recall and examination by the erstwhile Counsel for the accused, that she always returned the bank-in slips to the accused after she had deposited the money, which she received from the accused, into the bank. It was not put to this witness by the erstwhile Counsel for the accused that she had not deposited into the bank all the money which the accused handed her.

Mr. Sugumar Balakrishnan, Counsel for the accused, assailed the judgment of the learned Sessions Judge and submitted that she had misdirected herself when she imposed upon the accused a duty to rebut the case for the prosecution. This is how the learned Sessions Judge dealt with the defence in her judgment, at pp. 72 to 74 of the record of appeal:

> Defence
>
> Accused has to rebut Prosecution's case on a balance of probabilities by entering his (sic) defence.

Accused gave sworn evidence in the witness box. She told the Court that collection of revenue from water bill was short everyday ever since the day of 7 April 1989 when she first reported duty at MPT until the day when she was asked to stop collection of revenue for water bills were short from the amount of RM100 to RM500.

Accused also said she had problem in her job because of lack of proper training. She said she had problem of facing big crowd of public paying water bills to her.

Accused put her blame on her Senior Officer PW5, Ismail Yacob, her colleague PW3 by not solving her problem though she had confessed to them.

Further, accused defended that no date was written on the receipts concerned as she was acting on the advice given by PW7, PW10 and PW3 and it was done to cover the short collection of revenue.

On the other hand, Prosecution submitted that accused was merely trying to gain sympathy from the Court by saying that she had no proper training from the authority concerned and had problem to handle big crowd of public who came to pay the revenue to her.

Prosecution commented (sic) that accused had started collecting water revenue showed no sign of having problem as alleged by her. Prosecution pointed out according to audit report, the revenue collection from water bills was not short for the first 18 months when accused was working in MPT but money was misappropriated in the month of October to November 1990. Prosecution said he could not see any logic in accused's argument and submitted that if really accused had problem of facing the short collection it would be at the earlier stage as she was not very familiar with her job but not in the month of October to November 1990 where crime was suspected to be committed.

Prosecution challenged the accused if she put the blame on the Senior Officer and her colleague who mislead her, she should have at least called up Ismail Yacob the MPT Accountant to support her defence. Failure to call Ismail Yacob, Prosecution submitted that it was fatal to the defence case as it is hard for Court to believe the groundless allegation against PW3, PW7 and PW10.

Again, with the evidence adduced, I rule that accused has not successfully rebutted the Prosecution's case on a balance of probabilities. Therefore, I have to reject the accused's defence and rule that Prosecution has successfully proved his case beyond reasonable doubts against the accused. On conclusion I found the accused guilty of the offence charged against her under s. 409 of the Penal Code. I therefore convict the accused accordingly.

Mr. Sugumar Balakrishnan submitted that it is apparent from her judgment, *supra*, that the learned Sessions Judge have proceeded on the assumption that certain presumption had arisen for which the accused had to rebut. I am of the opinion that her choice of words is not merely a matter of style and language, but, rather, an indication that she did not consider at all whether the defence of the accused had, on a balance of probabilities, cast any reasonable doubt in the case of the prosecution. She had proceeded on the assumption that the accused had a duty to rebut the case for the prosecution. This is further demonstrated when she apparently adopted the prosecution submission in her judgment that the accused should have called a certain witness. There is no presumption against the accused in this case and, it is trite law, the only presumption is that of the innocence of the accused until proven guilty. Another way of looking at the way the learned Sessions Judge had dealt with the defence is this: in requiring the accused to rebut the case of the prosecution would mean imposing on the accused a higher standard of proof than that of creating reasonable doubt because the burden of rebutting a presumption is heavier than that of only creating a reasonable doubt (see *Mohamad Radhi bin Yaakob v. Public Prosecutor* [1991] 3 MLJ 169); this is a serious misdirection on the part of the learned Sessions Judge. In the recent case of *Pang Chee Meng v. PP* [1992] 1 MLJ 137 SC, the Supreme Court finds it necessary to remind everyone of the time-honoured principle which Lord Sankey, in *Woolmington v. DPP* [1935] AC 462, puts this way:

> Throughout the web of English Criminal Law, one golden thread is always to he seen, that it is the duty of the prosecution to prove the person's guilt. If at the end of and on the whole of the case, there is reasonable doubt, created by the evidence given either by the prosecution or the prisoner as to whether the offence was committed by him, the prosecution has not made out the case and the prisoner is entitled to an acquittal.

The learned Sessions Judge in requiring the accused to rebut the prosecution case had thereby shifted the onus of proof to the accused to establish her innocence which is against the

said time-honoured principle of criminal law. Thus it was said by Lee Hun Hoe J. (as he then was) in *Wong Sieng Ping v. PP* [1967] 56, at p. 58, that:

> It is clear that the onus of proof of guilt always rests upon the prosecution and never shifts to the accused under s. 104 of the Evidence Ordinance. This onus never shifts to the accused "to give an explanation" or "to establish a case" as it would be inconsistent with the presumption of innocence.

To that, I add that the onus also never shifts to the accused to "rebut the prosecution case". There is another ground of appeal which I have to consider and which will weigh on my decision whether to order a retrial.

Mr. Sugumar Balakrishnan submitted that there was no evidence that the sum of money alleged in the charge was entrusted to the accused. All that were produced were copies of the receipts which the accused had issued and which state that certain persons had made payment of certain sums. The question to be asked is this - are copies of the receipts proof that the persons named therein had paid the accused the sums therein stated? In our case, there are 1749 receipts for the total sum of RM156,663.90. Of relevance to the issue is the following passage in the recent Supreme Court case of *KPM Khidmat Sdn. Bhd. v. Tey Kim Suh* [1994] 2 AMR 27:1417 SC, at p. 1422-1423,:

> On the question of a balance sheet, the Indian Supreme Court, in *Petiad Turkey Red Dye Works Ltd. v. Dyes & Chemical Workers' Union Petiad & Anor.*[1], has held that a balance sheet does not by itself prove the facts stated therein. It has to be proved like any other fact by affidavit or otherwise. Das Gupta J., delivering the judgment of the Court, stated (at p. 909):
>
> > All that the balance sheet, as submitted, shows is that certain statements were made. The mere fact that the statements were made can never be taken as proving that the statements were correct.
> >
> > That is a distinction which the Courts of law have always been careful to make. Thus, if a person is to prove that he was ill on a particular date, the mere filing of a certificate of a medical man that he was ill on that date is not accepted as evidence to show that he was ill. The correctness of the statement made in the certificate has to be proved by an affidavit or oral testimony in Court by the Doctor concerned or by some other evidence. There is no reason why an exception should be made in the case of balance sheets prepared by Companies for themselves. It has to be borne in mind that in many cases the Directors of the Companies may feel inclined to make incorrect statements in these balance-sheets for ulterior purposes. While that is no reason to suspect every statement made in these balance-sheets, the position is clear that we cannot presume the statements made therein to be always correct. The burden is on the party who asserts a statement to be correct to prove the same by relevant and acceptable evidence.
>
> Likewise, in the instant case, the summary of accounts does not prove the facts and particulars stated therein. The mere fact that the summary of the particulars were made could never be taken as proving that the contents were correct. It has to be proved by calling the maker to explain the facts and basis of the calculation of the amount claimed...

Similarly, I am of the view that the mere production of copies of receipts signed by the accused is not proof that the accused had been paid the sums and by the persons named therein. The payers must be called or someone who had seen the payment must be called to give evidence. See *Chong Khee Sang v. Pang Ah Chee* [1984] 1 MLJ 377. The report (exhibit P15), which was relied on very heavily by the learned Sessions Judge in coming to her conclusion that there was a *prima facie* case, also does not establish the fact of any payment of money by anyone to the accused. In fact, the report should not have been admitted as evidence in place of the oral testimony of Chong because in a criminal case, except, I would add, where statutes allow, it is wrong for a witness to produce a report as a substitute for oral evidence. See *Saw Thean Teik v. R* [1953] MLJ 124. In any event, the report was prepared on the assumption that money was paid to the accused by virtue of the receipts being issued by the accused. The report does not provide proof of payment of the money to the accused. Therefore, the report, even assuming it is admissible, does not become proof of the payment of money to the accused. As regards the verification by Chong in relation to three payments noted in three receipts, respectively for the sums of RM72, RM24 and RM468.90 and in which he talked to the three payers and which sums were verified by him not to have been deposited in the bank for the credit of the Government, I need only state that none of the three payers were alleged to have said they paid the accused but, then again,

even if they had, evidence by Chong of such confirmation of payment of such money by the three payers to the accused is only hearsay. Such testimony of Chong also does not constitute evidence of payment by the three persons of the money to the accused.

The only clear evidence that money had been paid to the accused and which was not disputed came from the said Salmiah Talib (*supra*) but her evidence was only in respect of the total cash sum of RM4,512.10 which she received from the payers and which she thereafter gave to the accused. These sums were not credited to the account of the Government which means that the money had not been deposited with the bank. Aminar had testified that whatever money the accused had given her had been deposited with the bank. This could only mean that the accused had not given the money to Aminar for the purpose of depositing the same with the bank to the credit of the Government. At least, the evidence, considered with the fact that the accused did not post the receipt of the money in the cash book, establish, *prima facie*, criminal breach of trust of that amount. At the very least, the charge could have been amended at the close of the case for the prosecution and the accused having to enter her defence.

Given the circumstances of this case, the best course, in the interest of justice, is a retrial. I therefore set aside the order of conviction and sentence. There shall be a retrial before another Session Judge on the same charge or such other charge as the Public Prosecutor may decide bearing in mind that many payers of money may have to be called to give evidence which would not be the case if the accused is charged with a much lesser sum involving far fewer payers leaving the other sums for other charge or charges, which may be left outstanding till the disposal of the other charge. If a conviction be had in the other charge, the other offences alleged in the other charges, if admitted and if the parties consent, may be taken into consideration under the provisions of s. 171A of the Criminal Procedure Code or the other charges be withdrawn. This course of action is worth considering taking into account the fact that the accused was incarcerated in prison, for failing to raise the money required for a bail bond, from 9 May 1992 until 31 October 1992. I hasten to add, it is all up to the Public Prosecutor.

CHIN KON NAM & ANOR.

v.

CHAI YUN PHIN DEVELOPMENT SDN. BHD.

HIGH COURT, KUCHING
DATO' HAJI ABDUL KADIR BIN SULAIMAN J.
[SUIT NO. KG. 107 OF 1993 (II)]
13 APRIL 1994

LAND LAW: Caveat lodged by first plaintiff on land on the ground that he is entitled to or to be benefically interested in the land by virtue of a written agreement - Caveat lodged by second plaintiff on the grounds of being entitled to or to be beneficially interested in the land by virtue of an unregistered Memorandum of Transfer - Registrar serving notice under s. 178 of the Srarwak Land Code - Plaintiffs making application to avoid their caveats from being deemed to have lapsed - Whether the plaintiffs have any caveatable interest in the land.

The first plaintiff entered into an agreement for the purchase of a piece of land (the Land) from the defendant. The first plaintiff failed to keep to the payment schedules specified in the agreement and upto the 28 April 1985 (past the target date specified in the agreement) a total sum of RM190,000 only was paid leaving an outstanding balance of RM250,000.

As the first plaintiff needed a bank loan to meet the remaining sum due to be paid, the first plaintiff and the defendant entered into another agreement for the sale of the Land pursuant to which a bank loan wa granted and the defendant signed a Memorandum of Transfer in favour of the second plaintiff as nominee of the first plaintiff.

The Memorandum of Transfer could not be registered as certain sums due to the authorities had not been paid. The defendant refused to pay the sums and the plaintiffs refused to release the balance outstanding to the defendant. The defendant filed a suit claiming specific performance of the first agreement or alternatively for recission of both agreements, which suit was struck out. The plaintiffs lodged their respective caveats in order to protect their interest in the Land.

The plaintiffs filed a claim against the defendant *inter alia* for recission of the two agreements and for return of the amount already